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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

21 Cr. 412 (JSR)

5 ALVIN FERNANDEZ,

6
7 Defendant.

Sentence

8 -----x

9 New York, N.Y.
10 August 22, 2022
4:10 p.m.

11 Before:

12 HON. JED S. RAKOFF,

13 District Judge

14
15
16 APPEARANCES

17 DAMIAN WILLIAMS

18 United States Attorney for the
Southern District of New York

19 BY: MICAH F. FERGENSON

Assistant United States Attorney

20 MAHER & PITTELL, LLP

Attorney for Defendant

21 BY: JEFFREY G. PITTELL

M8M7FERS

(Case called; appearances noted)

THE COURT: Good afternoon. Please be seated.

We're here for sentencing. The first thing we need to do, even though it is probably of the least interest to the Court, is to calculate the sentencing guidelines. The presentence report says that the total offense level is 31, criminal history category is II and the guideline range, which of course is not binding on the Court, is therefore 121 to 151 months.

Any disagreement with that calculation from the government?

MR. FERGUSON: Your Honor, we're not challenging the calculation, although, we stand by the plea agreements' calculation.

THE COURT: Well, you agree with the accuracy of the calculation, correct?

MR. FERGUSON: We are not disputing it, your Honor.

THE COURT: No, that's not good enough.

I understand the government sometimes enters into agreements based on its understanding of what the guidelines should be, and then it finds out that, oh, no, they're somewhat different, maybe something higher, and they, therefore, feel bound to still adhere to their promise. That, I accept. But that doesn't mean that they can't answer the Court's question about a factual matter, which is: As a factual matter, as a

M8M7FERS

1 legal and factual matter, has the probation office now
2 correctly calculated the guidelines?

3 And the answer to that question should be easy in my
4 court since, as I have now said, at least 100 times, I regard
5 the sentencing guidelines as wholly irrational and deserving of
6 no weight. So, this is purely an exercise in what the law
7 requires a court to do that will have no impact whatsoever on
8 the sentence the Court will impose. But we still should get it
9 right.

10 So is the government's view that, as a factual and
11 legal matter, the probation office calculation is correct; yes
12 or no?

13 MR. FERGUSON: Yes, your Honor.

14 THE COURT: And defense counsel agrees?

15 MR. PITTELL: I do.

16 THE COURT: Okay. Very good. So I will adopt that
17 calculation. The total offense level is 31, the criminal
18 history category is II, and the guideline range is 121 to 151
19 months, which is considerably in excess of any sentence I will
20 hand out in this case to this defendant. But now that we've
21 got it done with, I adopt that calculation and adopt the
22 presentence report.

23 Now let's get to substance, which is where we should
24 sentence this defendant under Section 3553 of Title 18.

25 I'll ask counsel when they're addressing the Court to

M8M7FERS

1 go to the rostrum because you can take off your mask there and
2 it makes it much easier to understand what you're saying.

3 We'll begin with defense counsel.

4 MR. PITTELL: Thank you, your Honor. It's a relief to
5 be unmasked.

6 THE COURT: Maybe I can move things along a little bit
7 here. I will ask the government to confirm it, but my
8 understanding is that Mr. Fernandez is in the middle or, even
9 in broad terms, below the middle of the numerous defendants in
10 this case in terms of culpability. I have, in the past, while
11 imposing much more severe sentences on those who were highly
12 culpable, imposed sentences as low as three or four months for
13 some of the less culpable persons.

14 However, and of course every case is very particular
15 to the individual, there are a couple of things here that seem
16 to cut against your client. One in which the government
17 emphasizes several times is that when the defendant seemingly
18 became aware of the indictment, since it had been unsealed and
19 his codefendants had been arrested, not only did he not
20 surrender or take steps to try to surrender, but, more
21 importantly from my standpoint, he provided a false name upon
22 arrest.

23 What about that?

24 MR. PITTELL: Judge, that issue came up at the bail
25 hearing. I mean, Mr. Fernandez denied knowing that he had been

M8M7FERS

1 charged.

2 THE COURT: Yes. That's why I phrased it the way I
3 did. I will assume that for today's purposes, but what about
4 the false name?

5 MR. PITTELL: He was driving a car. He was with his
6 wife, who is actually here in court, and he knew that his
7 license had expired. So, that is why --

8 THE COURT: Sorry. It's coming back to me now, some
9 of the discussions we had previously.

10 MR. PITTELL: So that is why he did not give his true
11 name to the officer.

12 THE COURT: Doesn't it still show a state of mind,
13 that is, well, if you get caught and you're questioned by law
14 enforcement, if it's in your interest to lie, let's lie?

15 MR. PITTELL: Absolutely.

16 I mean, it's giving an untruthful answer to a police
17 officer, it's evasive. And, yeah, in hindsight, he should have
18 just given his real name. And if he had gotten a summons, or
19 some traffic offense for driving without a license, he
20 shouldn't have done that. I can't excuse it, I can only talk
21 about why, as I advocate in my sentencing memorandum, a
22 sentence of time served, I believe, is appropriate at this
23 point in this case.

24 THE COURT: Well, you couldn't very well argue for
25 less than time served, so that would be rather novel in the

M8M7FERS

1 history of Anglo-American sentencing, but --

2 MR. PITTELL: I don't want to be greedy about it. I
3 just thought because he had done some time because it took two
4 months to get him here and then another two months to get the
5 bond signed, and then, even though it's not real time in the
6 sense of behind bars time, he was on home incarceration for two
7 months. So I think that is really what I mean by the time
8 served.

9 I mean, what I try to do in this sentencing
10 submission -- and really what I try to do in every case, and
11 what I try to do in cases before you -- is I try and be as
12 thorough as I can in terms of what I write. I usually, at the
13 end, give a laundry list of reasons. A lot of times they point
14 to 3553(a) factors as to why whatever sentence I'm advocating
15 for is appropriate.

16 In this particular case, though, I want to briefly
17 point to two that I consider to be the most compelling. One,
18 as you already mentioned, is that some of the other defendants
19 who have been sentenced, they had similar base offense levels,
20 similar -- I know it doesn't matter, but similar guideline
21 range.

22 THE COURT: Well, as I say, everything is highly
23 individual. At least some of them were considerably younger
24 than this defendant. Not all, I think, but some of them.

25 MR. PITTELL: I looked at that. At the time of the

M8M7FERS

1 offense, or their arrest, or their last offense conduct, they
2 were in, more or less, their mid-20s. Mr. Fernandez, the last
3 undercover sale, he was 31. It's a difference, but not a
4 generational difference.

5 THE COURT: I wasn't thinking so much about that. The
6 argument that was made in some of those others cases was that
7 the defendants had committed the offenses before they were
8 fully mature, before their brain functions had reached total
9 maturity. Little harder to make that case here.

10 MR. PITTELL: Right. I'm not making that argument.

11 I mean, I know the brain function argument kind of
12 ends at about age 25, but maturity, emotional maturity comes at
13 different ages as opposed to physical maturity. And that kind
14 of goes into what I can say is the other one of the two
15 compelling reasons, the maturity or the waking up, or the full
16 realization that he finally had. Well, it took 30 years, or at
17 least it took him to reach age 30 or 31 to finally reach that
18 point, but he realized that living this life of slinging drugs
19 on a street corner in the Bronx is not the way to go.

20 This isn't an instance where someone has been arrested
21 and then I've told them, change your life from today on. He
22 had changed his life, taken steps, moved to Pennsylvania,
23 distanced himself from the Bronx, was not associating on a
24 daily basis. Because I've come to understand that everybody
25 pretty much knows everybody. I mean, some conspiracies, that's

M8M7FERS

1 not the case. But in this case, it was a more tightly knit
2 group. He cut himself off from all of that, to his credit, and
3 he's continued to do that.

4 Living with his wife, raising her kids, his daughter
5 comes to visit. I think the two things that he did in terms of
6 employment since he got out also shows maturity. Because of
7 living through the pandemic, not being in jail, he saw a need
8 for delivery services, tried to start a business with that.
9 Once he realized he couldn't do it on his own, he went and just
10 got a job a minimum wage job, frying chicken at a KFC
11 franchise. His manager was impressed by him, and it's
12 reflected in his letter, and now he's moving up the ladder.
13 And he's been, for the last couple of months, a night manager.
14 As his manager wrote in the letter, he's actually training him
15 to be the manager of the entire store. So, that's a real sign
16 of maturity. Came a little later, but it still seems like it's
17 here to stay.

18 So I think if I had to point to one reason why I'm
19 asking for the sentence that I'm asking, I think that's really
20 the real reason.

21 THE COURT: I think that's a strong argument. But now
22 what I've sometimes done in situations like this -- and again,
23 every case is different -- where I thought, nevertheless, the
24 amount of time served so far was not sufficient, is to impose
25 weekends in a halfway house. I don't know whether you've

M8M7FERS

1 discussed that with your client or not. That, of course, would
2 allow him to continue his employment.

3 MR. PITTELL: I have discussed that with him and that
4 is -- the key thing is him being given an opportunity to
5 continue to be employed.

6 THE COURT: What days and hours does he work?

7 MR. PITTELL: I mean, I know right now he's working
8 the night shift until 11. I don't know. I'll have to ask him.

9 THE COURT: Ask him. Let's find out.

10 (Counsel conferred with defendant)

11 MR. PITTELL: He says it could be arranged so that he
12 could only work weeknights.

13 THE COURT: Okay. Very good.

14 All right. We'll come back to you in a minute,
15 because I'm sure there are other things you wanted to say, but
16 let me hear next from the government.

17 MR. PITTELL: Okay.

18 MR. FERGUSON: Just briefly, your Honor, I think the
19 Court has already hit on the two points that the government
20 would emphasize, which is that the defendant's relatively more
21 senior aged in the crew. We believe that translates into a
22 higher level of culpability.

23 In addition, the circumstances of his arrest in
24 Oregon, the government would submit that the notion that he
25 didn't know that all the friends he grew up with and himself

M8M7FERS

1 had been indicted a month earlier after it had been unsealed is
2 frankly ridiculous. There's just no way he didn't know. So,
3 because I can't show a text message to the Court proving that,
4 I would appeal to the Court's common sense, as we often do,
5 that that simply is not the explanation here. So I think it is
6 appropriately viewed through that lens, your Honor.

7 Unless the Court has specific questions, the
8 government would rest there.

9 THE COURT: Thank you very much.

10 Anything further from defense counsel?

11 MR. PITTELL: No. Thank you.

12 THE COURT: All right. Well, I am persuaded, on the
13 one hand, by the government, that regardless of the reason why
14 he gave a false name when arrested, Mr. Fernandez did show
15 that, even as recently as then, he had not fully come to grips
16 with his responsibility as a citizen and as someone in this
17 country to be candid, forthright, and accurate.

18 However, I agree with defense counsel that this is
19 relatively small potatoes in the bigger picture, and that this
20 defendant was not one of the major players in this conspiracy,
21 and that many, though not all, of the factors that were present
22 in the case of some of his codefendants who I sentenced to
23 three or four months are present here.

24 So, if that were the end of the subject, I would
25 sentence the defendant to five months in prison. However, I

M8M7FERS

1 think his employment is very important both to him, his family,
2 and society. So instead, I will impose a situation where he
3 will be, in terms of present incarceration, sentenced to time
4 served, but a condition of his release, or supervised release,
5 will be that he serves the first 15 weekends in a halfway
6 house. So let's put that into a more formal fashion.

7 The sentence of the Court is that the defendant is
8 sentenced to time served to be followed by three years of
9 supervised release on terms I will get to in a moment.

10 No fine will be imposed because the Court makes the
11 finding this defendant is not in a position to pay any
12 meaningful fine in the foreseeable future. There is, however,
13 a \$100 mandatory special assessment that must be paid.

14 I take it the government is not seeking forfeiture; is
15 that correct?

16 MR. FERGUSON: That's correct.

17 THE COURT: In terms of supervised release, the
18 mandatory conditions are that the defendant must not commit any
19 other federal, state, or local crime; he must not unlawfully
20 possess a controlled substance; that within 15 days of his
21 release from imprisonment -- essentially, now -- he will submit
22 to one drug test to be followed by two periodic drug tests
23 thereafter as determined by the probation office; and he must
24 cooperate in the collection of DNA.

25 There will also be imposed the standard conditions 1

M8M7FERS

1 through 12. They appear on the face of the judgment, but also
2 will be gone over with the defendant by the probation office
3 when he reports to begin his period of supervised release. And
4 he must report to begin his period of supervised release within
5 72 hours of his release from incarceration.

6 Finally, there are the special conditions:

7 First, that for the first period of his supervised
8 release, the first 15 weekends of supervised release will be
9 spent at a halfway house designated by the probation office to
10 which he will report to no later than 7 p.m. on Fridays, and
11 from which he will be released no earlier than 7 a.m. on
12 Mondays;

13 Second, that the defendant will participate in an
14 outpatient treatment program for drugs and alcohol, the
15 standard terms and conditions;

16 Third, that the defendant will be supervised by his
17 district of residence.

18 Now, before I advise the defendant of his right to
19 appeal, anything else from the government?

20 MR. FERGUSON: The government would move to dismiss
21 any open counts.

22 THE COURT: That motion is granted.

23 Anything from the defense?

24 MR. PITTELL: No. Thank you.

25 THE COURT: So, Mr. Fernandez, you have a right to

M8M7FERS

1 appeal the sentence.

2 Do you understand that?

3 THE DEFENDANT: Yes, your Honor.

4 THE COURT: If you can't afford counsel for the
5 appeal, the Court will appoint one for you free of charge.

6 Do you understand that?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Very good. Thanks a lot.

9 MR. PITTELL: So he works nights and he said it could
10 be arranged so that he will work all weeknights.

11 THE COURT: Thank you.

12 Mr. Fernandez, this is totally up to you. I don't
13 care one way or another. Do you want to report to the halfway
14 house at 7 p.m. on Fridays and released at 7 a.m. on Mondays,
15 which is the normal situation, or would you prefer that you
16 report at 7 a.m. on Saturday and are released at 7 p.m. on
17 Monday?

18 THE DEFENDANT: The first one is --

19 THE COURT: The first one. That's the one we have in
20 place.

21 Thanks very much.

22 THE DEFENDANT: All right.

23 (Adjourned)